(1)

Supreme Court, U.S.
FILED

NO. 03 149 MAR 17 2003

IN THE
SUPREME COURT OF THE UNITED STATES

JUDY BLANDO, Individually and as Representative and Administrator of the Estate of TROY BLANDO-Deceased, and as next friend for Daniel Blando, a minor child; DANIEL BLANDO, a minor child, and DELLA BLANDO,
Petitioners

vs.

THE CITY OF HOUSTON, TEXAS
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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39 MP

QUESTIONS PRESENTED

1. Whether the trial court erred in dismissing this case on the grounds that Petitioners failed to state the facts that would support a cause of action for municipal liability against The City of Houston, Texas, pursuant to a violation of 42 U.S.C. §1983?

2. Whether the trial court erred in dismissing this case on the grounds that Petitioners failed to state the facts that would support a cause of action for a "state created danger" by the City of Houston, Texas pursuant to a violation of 42 U.S.C. §1983?

PARTIES TO THE PROCEEDING

The Petitioners in this case are Judy Blando, Individually and as Representative and Administrator of the Estate of Troy Blando-Deceased, and as next friend for Daniel Blando, a minor child; Daniel Blando, a minor child, and Della Blando.

The Respondent in this case is The City of Houston, Texas.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JUDY BLANDO, Individually and as Representative and Administrator of the Estate of TROY BLANDO-Deceased, and as next friend for Daniel Blando, a minor child; DANIEL BLANDO, a minor child, and DELLA BLANDO,
Petitioners

v.

THE CITY OF HOUSTON, TEXAS
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATESCOURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Come now JUDY BLANDO, Individually and as Representative and administrator of the Estate of TROY BLANDO, deceased, and as next friend for DANIEL BLANDO, a minor child, and DELLA BLANDO, (hereafter the "BLANDO FAMILY") respectfully petition for a writ of certiorari to review the judgment of the United States Court of

Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals, whose judgment is herein sought to be reviewed is unpublished, and is reprinted in the Appendix to this Petition as Appendix A. The prior opinion of the United States District Court for the Southern District of Texas, entered on June 20, 2002 is unpublished, and is reprinted in the Appendix to this Petition as Appendix B. The prior opinion of the United States District Court for the Southern District of Texas, entered on March 14, 2002, is unpublished, and is reprinted in the Appendix to this Petition as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals was entered on December 16, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction of the United States, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The estate of Officer Troy Blando, his wife Judy, his son Daniel and his mother Della sued Houston Fire Chief Lester Tyra in his official capacity, and the City of Houston, Texas pursuant to 42 U.S.C. Section 1983 and 1988, to redress the deprication under color of law each of their rights secured to them by the Fourteenth Amendment to the United States Constitution. Each seeks money damages and an award of attorney's fees and costs.

BACKGROUND

In 1998, Fire Chief Lester Tyra assigned Captain Donald R. Clark to Fire-Alarm on the B-Shift. One of Captain Clark's job responsibilities was to take emergency calls and dispatch ambulances in response to those calls. For the twenty years prior to 1998, Captain Clark was a dispatcher assigned to Central Command performing non-dispatch duties.

Prior to the day Officer Troy Blando was shot, Captain Clark advised Chief Tyra that he had a hearing disability and that due to such disability he could not hear well enough to adequately and safely perform his dispatch duties. Clark asked Tyra to assign him to other duties.

Despite Tyra's personal knowledge of Clark's hearing disability, Tyra refused to reassign Clark.

As a result, Clark took a call on May 19, 1999 at approximately

9:00 a.m. regarding the shooting of Officer Troy Blando and, because of his hearing disability, dispatched an ambulance to the wrong location.

In addition, there were delays in getting ambulances dispatched to both the wrong and right location of the shooting due to deficiencies in the dispatch system that were actually or constructively known to the policymaker, Fire Chief Tyra.

Because of these errors, an ambulance did not arrive at the scene of the shooting until almost 9:35 a.m., which is approximately twenty-three minutes after Captain Clark received the initial call.

Officer Blando was conscious, alert, responsive and able to speak during the time period between the time of the shooting and the time an ambulance finally arrived on the scene.

EMS personnel left the shooting scene with Officer Blando in route to Ben Taub Hospital at just after 9:35 a.m., at which time Officer Blando was able to speak to the personnel on the ambulance.

Officer Blando arrived at the hospital at approximately 9:45 a.m. Officer Blando's heart stopped beating and CPR was started as the ambulance arrived at the emergency room at Ben Taub Hospital. Attempts to revive him failed and he was pronounced dead at approximately 10:23 a.m.

Chief Tyra's assignment and retention of Captain Clark as an emergency dispatcher as well as his continuing to operate a dispatch system that caused significant delays in the dispatch of emergency

services were done with deliberate indifference and directly resulted in a significant delay in the rendition of emergency services to Officer Blando. These policies and/or customs were the moving force and a proximate cause of constitutional violations to Officer Blando (i.e. Officer Blando's death).

THE LAW

In *Piotrowski v. City of Houston*, 51 F.3d. 512 the United States Court of Appeals stated as follows: "We review a 12 (b) (6) dismissal de novo. We must accept all well-pleaded facts as true, and we review them in the light most favorable to the plaintiff. *Green v. State Bar of Texas*, 27 F. 3d 1083, 1086 (5th Cir. 1994). In our de novo review, we apply the same standard as that used by the district court: A claim may not be dismissed unless it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would enable him to relief. *Leffall v. Dallas Indep. Sch. Dist.*, 28 F. 3d 521, 524 (5th Cir. 1994) (citing *Norman v. Apache Corp.*, 19 F. 3d 1017, 1021 (5th Cir. 1994); *Carney v. RTC*, 19 F.3d 950, 954 (5th Cir. 1994); see also *Green*, 27 F.3d at 1086 (A dismissal will not be affirmed if the allegations support relief on any possible theory.)."

A. Municipal Liability Under Section 1983

Municipal liability under Section 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose "moving force" is the policy or custom. *Monell v. Dept. of Social Services*, 436 U.S. 659, 694, 98S.Ct.2018, 2037

(1978).

1. Policymaker

In analyzing a similar case, the United States Court of Appeals has identified the City of Houston Chief of Police as a policymaker for purposes of Section 1983 liability. *Webster v. City of Houston*, 735 F.2d 838, 842 (5th Cir. 1984).

In their First Amended Complaint in the District Court, the Blando Family clearly asserted that Fire Chief Lester Tyra was the policymaker for the City of Houston regarding the training and assignment of Fire Department personnel, and regarding the operation, staffing and supervision of all parts or divisions of the Houston Fire Department, including its emergency dispatch system, prior to and on May 19, 1999. The Blando Family further alleged that Chief Tyra was the policymaker responsible for ensuring the proper and timely functioning of the Houston Fire Department dispatch system prior to and on May 19, 1999.

2. Official Policy

Municipal liability for Section 1983 violations results if a deprivation of constitutional rights was inflicted pursuant to official custom or policy. *Piotrowski v. City of Houston*, 237 F. 3d 567,579 (5th Cir. 2001). Municipal liability under 42 U.S.C. Section 1983 may be imposed for a single decision by a municipal policymaker when a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for

establishing final policy with respect to the subject matter in question. *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). Further the Supreme Court has recognized that "a final decisionmaker's adoption of a course of action tailored to a particular situation and not intended to control decisions in later situations may, in some circumstances, give rise to municipal liability under Section 1983." *Bd of the County Comm'ns of Bryan County v. Brown*, 520 U.S. 387, 117 S.Ct. 1382 (1997). Similarly the Fifth Circuit had recently held that a single decision by a policy maker may, under certain circumstances, constitute a policy for which the municipality may be held liable. *Brown v. Bryan County*, 219 F.3d 450, 462 (5th Cir. 2000). See also at *Janes v. Hernandez*, 215 F.3d 541 (5th Cir. 2000) and *Van Ootegham v. Gray*, 774 F.2d 1332 (5th Cir. 1985). In order to establish liability, the Blando Family "must demonstrate that the action was taken with 'deliberate indifference' as to its known or obvious consequences." *Bd of the County Comm'ns of Bryan County v. Brown*, 520 U.S. at 407.

The United States Court of Appeals in *Bennet v. Pippin*, 74 F.3d 578 (5th Cir. 1996) stated as follows:

"Our cases make clear that under *Monell*, ' a single decision may create municipal liability if that decision was made by a final policymaker responsible for that activity.' *Brown v. Bryan County, Oklahoma*, 67 F.3d 1174, 1183 (5th Cir. 1995) (emphasis in original); see also *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124-25, 99 L.Ed. 2d 107, 108 S. Ct. 915 (1988); *Turner v. Upton County, Texas*, 915 F.2d 133, 136-

37 (5th Cir. 1990) cert. Denied, 498 U.S. 1069, 112 L.Ed 2d 850, 111 S.Ct. 788 136-38 (1991). When a final policy maker makes the relevant decision, and when that decision is within the sphere of the policy maker's final authority, ' the existence of a well-established, officially-adopted policy will not insulate the municipality from liability.' *Gonzalez v. Ysleta Independent School District*, 996 F.2d 136-42 745, 754 (5th Cir. 1993).

In the District Court, the Blando Family alleged that Fire Chief Tyra assigned Captain Donald R. Clark to Fire-Alarm on the B Shift in 1998. One of Captain Clark's job responsibilities was to take emergency calls and dispatch ambulances in response to those calls. The Blando Family further alleged that prior to May 19, 1999, Captain Clark advised Fire Chief Tyra that he had a hearing disability and that due to such disability, he could not hear well enough to adequately and safely perform his dispatch duties. The Blando Family alleged that despite his knowledge of Clark's hearing problem, Fire Chief Tyra refused to reassign Clark. As a result, Clark took the call on May 19, 1999 regarding the shooting of Officer Blando and, because of his hearing disability, dispatched an ambulance to the wrong location causing significant delay in getting Officer Blando to the hospital.

The facts alleged by the Blando Family in the District Court clearly met the pleading requirements for liability for this single action by Fire Chief Tyra. The Blando Family have alleged that Tyra's action was done with "deliberate indifference" to the known consequences that a significant delay in the rendition of emergency

services could and/or would result by allowing a hearing impaired person to take dispatch calls. Ultimately, that is exactly what happened in this case. As such, the Blando Family have adequately pled the second prong for municipal liability under Section 1983.

3. "Moving Force" Causation

In addition to culpability, the Blando Family was required to show a direct causal link between the municipal policy and the constitutional deprivation. In other words, the policy must be the "moving force" behind the violation. *Monell v. Dept of Social Services*, 436 U.S. at 694, 98 S.Ct. at 2037-2038.

The constitutional deprivation in this case, as alleged by the Blando Family, was Officer Troy Blando's loss of life. The Blando Family contended that Officer Blando would not have lost his life if it were not for the actions of Fire Chief Tyra. In several portions of its Motion to Dismiss in the District Court, the City of Houston appeared to imply the Blando Family was alleging that the City had a responsibility to protect Officer Blando from the man who shot him. That is not what the Blando Family was alleging. The key to the Blando Family's claims was delay in rendition of emergency medical treatment causing Officer Blando's loss of life, not the shooting itself.

The Blando Family's allegations were that Fire Chief Tyra's actions caused significant delay in the rendition of emergency services to Officer Blando and were the "moving force" in the death of Officer Blando. The Blando Family contended that when an ambulance finally did get to Officer Blando (approximately 23 minutes after Clark

received the initial call), he was alert and responsive. The Blando Family further alleged that he was alert and responsive in the ambulance on the way to the hospital and was able to speak to personnel on the ambulance. Finally, the Blando Family contended that Officer Blando's heart did not stop beating until the ambulance actually arrived at Ben Taub Hospital. Under these set of facts, and including all inferences in favor of the Blando Family, the Blando Family has adequately pled that the City's actions through Fire Chief Tyra were the "moving force" of the death of Officer Blando.

B. State Created Danger

The Petitioners have additionally pled that the City of Houston's conduct, by and through Chief Tyra caused a "State Created Danger" for Officer Blando. The policy behind this claim is that "[w]hen state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct....." *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 200, 201 (5th Cir. 1994).

The United States Court of Appeals in *McClendon v. City of Columbia*, 258 F.3d 432 (5th Cir. 2001) recognized that "the key element in the state created danger theory is a determination that the state actor created the danger to the plaintiff or at least made him more vulnerable to it." In addition "[i]f the plaintiff advances a genuine issue of material fact that a state actor created such a danger, his claim under Section 1983 for a violation of due process rights should not be

dismissed on summary judgment."

In *Piotrowski I*, the Fifth Circuit set forth the elements of the "State Created Danger" theory. First, the Blando Family must show that the state actor increased the danger. Second, the Blando Family must show that the state actor acted with "deliberate indifference." *Piotrowski v. City of Houston*, 51 F.3d 512, 515 (5th Cir. 1995).

In order to establish "deliberate indifference" the Petitioners must further establish that three elements are met. These are: (1) "the environment created by the state actors must be dangerous; (2) they must know it is dangerous; and ...(3) they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Id. Johnson at Page 201.*

C. Factors of Increased Danger Met in Instant Case

1. Increased Danger

The increased danger in this case was delay of treatment for persons requiring emergency care, such as Officer Blando.

2. Deliberate Indifference

(A) Dangerous Environment Created

Chief Tyra created a dangerous environment by making an affirmative decision to retain a hearing impaired emergency dispatcher after being expressly informed that the dispatcher was not able to perform his duties safely;

(B) Knowledge of Danger

Chief Tyra continued the employment of Clark in the dispatch department after being alerted to Clark's inability to safely

fulfill his duties because of his hearing impairment; and

(C) Authority to Create Opportunity

It is undisputed that The City of Houston, by and thru Chief Tyra, had the authority to delineate the dispatching duties to the employees he selected. Chief Tyra's actions caused significant delay in the rendition of emergency services (delayed arrival of the ambulance to the shooting scene) to Officer Blando and were the "moving force" in the death of Troy Blando.

As the facts demonstrate above, The City of Houston, acting through its policymaker, Chief Tyra:

1. Created the danger to Officer Blando - unnecessarily delayed emergency services;
2. Made Officer Blando more vulnerable to the danger - delay exaserbated his injuries; and
3. Increased Officer Blando's vulnerability to danger - delay proximately caused his death.

THE INITIAL PROCEEDINGS IN THE DISTRICT COURT

This suit was filed in the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. Section 1331 (g) and 1343 (3) and (4) alleging that the case involves federal questions and predominate federal issues under the Constitution and laws of the United States.

The City of Houston, Texas and Lester Tyra moved to dismiss under Rule 12 (b).

The final judgments of the United States District Court for the

Southern District of Texas, dated March 14, 2002 and June 20, 2002, disposed of all issues and all parties, stating that the Blando Family failed to allege facts that would establish the violation of a constitutional right under 42 U.S.C. §1983.

THE COURT OF APPEALS DECISION

The Fifth Circuit Court of Appeals had jurisdiction under 28 U.S.C. Section 1291 because of a timely appeal from final judgments of the United States District Court for the Southern District of Texas, dated March 14, 2002 and June 20, 2002 that disposed of all issues and all parties. The Blando Family gave timely notice of appeal on April 8, 2002 and on July 19, 2002, both pursuant to FED. R. APP. P. 4 (2) (1).

The final judgment of the United States Court of Appeals for the Fifth Circuit, dated December 16, 2002, affirmed the judgment of the District Court, stating that the Blando Family failed to allege the violation of constitutional rights cognizable in an action under 42 U.S.C. §1983 and that the City of Houston was properly dismissed by the District Court.

REASONS FOR GRANTING THE PETITION

The judgment of the United States Court of Appeals for the Fifth Circuit should be reviewed by this Court because the decision of the lower court was erroneous. The Petitioners stated the facts that would support a cause of action for municipal liability against The City of Houston, Texas, pursuant to a violation of 42 U.S.C. §1983. Additionally, Petitioners stated the facts that would support a cause of action for a "state created danger" by the City of Houston, Texas

pursuant to a violation of 42 U.S.C. §1983.

The national importance of having the Supreme Court decide the questions involved is to ensure that governmental entities are held accountable for decisions of policymakers that are made with deliberate indifference and lead to the death of citizens.

Furthermore, the decision of the United States Court of Appeals for the Fifth Circuit is in direction conflict with the decisions made in *Piotrowski v. City of Houston*, 237 F. 567,579 (5th Cir. 2001) and *Bd of the County Comm'ns of Bryan County v. Brown*, 520 U.S. 387, 117 S.Ct. 1382 (1997). These cases clearly encompass a fact scenario such as the one presented in this case. Policymaker Tyra clearly committed a deliberate act in assigning and retaining Captain Clark as a dispatcher. This deliberate decision clearly led to a significant delay in the treatment of Officer Blando, which Petitioners alleged directly led to his death. Such a scenario clearly states a set of facts sufficient to state a valid cause of action under 42 U.S.C. §1983.

CONCLUSION

For the foregoing reasons, the petitioners respectfully pray that their Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JUDY BLANDO, Individually and as Representative and Administrator of the Estate of TROY BLANDO-Deceased, and as next friend for Daniel Blando, a minor child; DANIEL BLANDO, a minor child, and DELLA BLANDO,
Petitioners

vs.

THE CITY OF HOUSTON, TEXAS
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APPENDIX A

U.S. COURT OF APPEALS - FILED - DEC 16, 2002 CHARLES R. FULBRUGE, III, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20402
Summary Calendar

JUDY BLANDO, Individually and as Representative and Administrator of the Estate of TROY BLANDO-Deceased, and as next friend for Daniel Blando, a minor child; DANIEL BLANDO, a minor; and DELLA BLANDO,
Plaintiffs-Appellants,

versus

LESTER TYRA, Etc.; ET AL,
Defendants,

CITY OF HOUSTON, TEXAS,
Defendant-Appellee.

Appeals from the United States District Court
for the Southern District of Texas
USDC No. H-01-CV-1680

Before HIGGINBOTHAN, SMITH, and CLEMENT, Circuit Judges.

PER CURIAM: *[1]

Judy and Della Blando appeal the dismissal of their 42 U.S.C. § 1983 claims against the City of Houston, Texas, pursuant to FED. R. CIV. P. 12(b)(6). This court conducts a de novo review of a Rule 12(b)(6) dismissal for failure to state a claim. Roark v. Humana, Inc., 307 F.3d 298, 313 (5th Cir. 2002). All well pleaded factual allegations in the complaint are accepted as true, and the complaint is construed in the light most favorable to the plaintiffs. Herrmann Holdings, Ltd. v. Lucent Technologies, Inc., 302 F.3d 552, 557 (5th Cir. 2002).

The Blandos argue that a state-created danger deprived Officer Troy Blando of his constitutional right to life. This court has not expressly adopted nor expressly rejected the state-created-danger theory of recovery under 42 U.S.C. § 1983. Morin v. Moore, 309 F.3d 316, 321 (5th Cir. 2002); see also McClendon v. City of Columbia, 305 F.3d 314, passim, (5th Cir. 2002) (en banc).

The Blandos' claims were properly dismissed even were this court to adopt the state-created-danger theory. For a plaintiff to prevail under the state-created-danger theory, the plaintiff must show that 1) the environment created by a state actor was dangerous, 2) the state actor knew of the danger, and 3) the state actor used his authority to create an opportunity that otherwise would not have existed for a third-party's crime to occur. Randolph v. Cervantes, 130

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Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

F.3d 727, 731 (5th Cir. 1997). The Blandos failed to show that the environment created by the City of Houston was dangerous. See Salas v. Carpenter, 980 F.2d at 306-07, 310. Officer Blando was fatally wounded by a gunshot wound inflicted by a third party. The Due Process Clause of the Fourteenth Amendment does not generally require the government to protect its citizens against the acts of private actors. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989). Thus, the plaintiffs did not allege a constitutional violation for which 42 U.S.C. § 1983 permits recovery.

The Blandos argue that the City of Houston is liable for Officer Blando's death. Generally, municipal liability required proof of 1) a policymaker, 2) an official policy or custom, and 3) a violation of constitutional rights whose moving force is the policy or custom. Delano-Pyle v. Victoria County, Tex., 302 F.3d 567, 574 (5th Cir. 2002). Because the plaintiffs failed to allege the violation of constitutional rights cognizable in an action under 42 U.S.C. § 1983, the City of Houston was properly dismissed by the district court. The judgment of the district court is AFFIRMED.

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JUDY BLANDO, Individually and as Representative and Administrator of the Estate of TROY BLANDO-Deceased, and as next friend for Daniel Blando, a minor child; DANIEL BLANDO, a minor child, and DELLA BLANDO,
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vs.

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Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APPENDIX B

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
ENTERED JUN 20 2002
MICHAEL N. MILBY, CLERK OF COURT

IN THE UNITED STATE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JUDY BLANDO, Individually and as Representative and administrator of the estate of TROY BLANDO deceased, and as next of friend for DANIEL BLANDO, a minor child, and DELLA BLANDO,	}	
Plaintiffs,	}	**CIVIL ACTION NO.**
vs.	}	**H-01-1680**
LESTER TYRA, in his official capacity as Chief of the Houston, Texas Fire Department and the CITY OF HOUSTON,	}	
Defendants.	}	

MEMORANDUM AND ORDER

Pending before the Court is Defendant Lester Tyra's motion to dismiss, and in the alternative, motion for a more definite statement. (Document No. 27). After reviewing the record and the applicable law, the Court concludes that the motion to dismiss should be **GRANTED.**

I. BACKGROUND

Captain Donald R. Clark ("Clark"), a 20-year veteran of the Houston Fire Department, suffers from a hearing disability which requires that he wear hearing aids in both ears. In 1998 Lester Tyra ("Tyra"), Chief of the Houston Fire Department, assigned Clark ("Clark") to Fire-Alarm on the B-Shift. Clark's responsibilities on Fire-Alarm included receiving emergency calls and dispatching ambulances. Sometime after Clark was assigned to dispatch duties, plaintiff alleges, Clark advised Chief Tyra that his hearing disability could compromise his ability to perform the critical task assigned him. Despite Clarks alleged warning, Tyra failed to relieve Clark of his duties as an emergency dispatcher.

At approximately 9:00 a.m. on May 19, 1999, Officer Troy Blando was shot while performing his duties as a police officer for the City of Houston. Shortly after the shooting, a 911 call was received by Captain Clark. Clark took down Blando's location and dispatched ambulance to the scene. However, the address taken down by Clark was inaccurate. As a result, the ambulances were delayed nearly 23 minutes until the mistake was discovered and corrected. An ambulance finally arrived on the scene at approximately 9:35 a.m. Upon arrival, paramedics found Blando to be alert and responsive. The paramedics rushed Blando to the hosptial. In route, however, Blando's heart stopped. Paramedics began C.P.R., which was continued upon arrival to the hospital. Unfortunately, the efforts to

resuscitate Blando were unsuccessful. Blando was declared dead at 10:23 a.m.

The representative of Blando's estate and relatives filed the present action against the City of Houston and Chief Tyra on May 18, 2001 asserting a cause of action under 42 U.S.C. § 1983. On March 13, 2002 the Court granted the City of Houston's motion to dismiss. Presently before the Court is Tyra's motion to dismiss.

II. STANDARD OF REVIEW

In reviewing the sufficiency of a complaint in response to a motion to dismiss under rule 12(b)(6) before any evidence has been submitted the court's task is limited. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The issue is not whether plaintiffs will ultimately prevail, but whether the claimant is entitled to offer evidence to support its claims. *Id.* The court must consider all pleaded facts in the complaint. *Lawal v. British Airways, PLC*, 812 F. Supp. 713, 716 (S.D. Tex. 1992). Dismissal is not appropriate "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle him to relief. Conclusory allegations or legal conclusions masquerading as factual conclusions do not defeat a motion to dismiss. *Fernandez-Montes v. Allied Pilot Assoc.*, 987 F.2d 278, 284 (5th Cir. 1993).

III. DISCUSSION

Plaintiffs' suit against Tyra in his official capacity is treated as a suit against the City of Houston itself. See *Hafer v. Melo*, 502 U.S. 21,

25 (1991) ("official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.") (internal quotations omitted). To prevail on a claim against a municipality under § 1983, Plaintiffs must allege facts which demonstrate: "(1) that a policy or custom existed; (2) that the governmental policy makers actually or constructively knew of its existence; (3) that a constitutional violation occurred; and (4) that the policy or custom served as the "moving force" behind the violation." *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 532-33 (5th Cir. 1996) (citing *Palmer v. City of San Antonio*, 810 F.2d 514, 516 (5th Cir. 1987)).

Tyra argues that Plaintiffs fail to state a claim under § 1983 because the facts alleged do not form the basis of a constitutional violation. In their complaint, Plaintiffs allege that "Fire Chief Tyra's conduct deprived Officer Troy Blando of the following due process rights: a) the right to life; b) the right to liberty; c) the right to bodily integrity; d) the right of association with his wife Judy Blando, his son Daniel Blando and his mother, Della Blando." (Document No. 1, ¶ 7.10).

The due process clause is a limitation on governmental power. The clause limits the government's ability to deprive individuals of life, liberty, and property. The clause does not, however, impose affirmative duties on the government to protect an individual's life, liberty, and property, from incursions by other individuals. In

DeShaney v. Winnebago County Department of Social Services, the Supreme Court held that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." 489 U.S. 189, 195 (1989). Accordingly, courts have uniformly held that, in general, a governmental entity does not have an affirmative duty to provide emergency medical care. See *Hill v. Shobe*, 93 F.3d 418, 422 (7th Cir. 1996) (holding that "The government, however, has no affirmative constitutional duty to provide emergency medical services to its citizens."); *Tucker v. Callahan*, 867 F.2d 909, 914 (6th Cir. 1989) (holding that a police officer did not have an affirmative duty to provide medical assistance if he did not cause the injury.).

Plaintiffs' First Amended Complaint alleges that "the delays in the dispatch of emergency services were done with deliberate indifference and directly resulted in a significant delay in the rendition of emergency service to Officer Troy Blando" resulting in a violation of Blando's due process rights. While the Court feels sympathy for the tremendous loss suffered by the Blando family, these facts fail to allege the violation of a constitutional right. The Due Process Clause does not require a municipality to provide emergency medical assistance. Therefore, a delay in providing emergency medical assistance, that the municipality was not required to give, does not violate the Constitution.

Plaintiffs further argue that Tyra is liable under the state created danger theory. *See McClendon v. City of Columbia*, 258 F.3d 432 (5th Cir. 2001) (presently set for rehearing *en banc*); *Piotrowski v. City of Houston*, 51 F.3d 512 (5th Cir. 1995). The Court concludes, however, that the state created danger theory is not applicable to the present case. The Fifth Circuit has never applied the state created danger theory to emergency medical services. In fact, as discussed above, the case law clearly states that governmental entities do not have a duty to provide emergency medical care unless it was the cause of the injury. In the instant case, a private actor was responsible for the fatal injury to Officer Blando. Therefore, the danger to Blando was not created by the "state." The theory does not state a cause of action against Tyra.

IV. CONCLUSION

The facts alleged in Plaintiffs' complaint, taken as true, fail to state a claim under § 1983 and, therefore, must be dismissed.

Accordingly, the Court

ORDERS that Defendant Lester Tyra's motion to dismiss is **GRANTED**.

SIGNED at Houston, Texas, this 19th day of June, 2002.

"s/ Melinda Harmon"

United States District Judge

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
ENTERED JUN 20 2002
MICHAEL N. MILBY, CLERK OF COURT

IN THE UNITED STATE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JUDY BLANDO, Individually and as Representative and administrator of the estate of TROY BLANDO deceased, and as next of friend for DANIEL BLANDO, a minor child, and DELLA BLANDO,	}	
Plaintiffs,	}	CIVIL ACTION NO.
vs.	}	H-01-1680
LESTER TYRA, in his official capacity as Chief of the Houston, Texas Fire Department and the CITY OF HOUSTON,	}	
Defendants.	}	

ORDER

In accordance with the memorandum and order of this date, all claims brought by Plaintiffs against the defendants in the above-referenced action have been dismissed. Accordingly, the Court **ORDERS** that this case is hereby **CLOSED**.

SIGNED at Houston, Texas, this 19th day of June, 2002.

"s/ Melinda Harmon"

United States District Judge

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JUDY BLANDO, Individually and as Representative and Administrator of the Estate of TROY BLANDO-Deceased, and as next friend for Daniel Blando, a minor child; DANIEL BLANDO, a minor child, and DELLA BLANDO,
Petitioners

vs.

THE CITY OF HOUSTON, TEXAS
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED MAR 15 2002
MICHAEL N. MILBY, CLERK OF COURT

IN THE UNITED STATE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JUDY BLANDO, Individually and as Representative and administrator of the estate of TROY BLANDO deceased, and as next of friend for DANIEL BLANDO, a minor child, and DELLA BLANDO,	}	
Plaintiffs,	}	CIVIL ACTION NO.
vs.	}	H-01-1680
LESTER TYRA, in his official capacity as Chief of the Houston, Texas Fire Department and the CITY OF HOUSTON,	}	
Defendants.	}	

MEMORANDUM AND ORDER

Pending before the Court is Defendant City of Houston's motion to dismiss. (Instruments No. 5 and 12). After reviewing the record and the applicable law, the Court concludes that the motion to dismiss should be **GRANTED**.

I. BACKGROUND

Captain Donald R. Clark ("Clark"), a 20-year veteran of the Houston Fire Department, suffers from a hearing disability which requires that he wear hearing aids in both ears. In 1998 Lester Tyra ("Tyra"), Chief of the Houston Fire Department, assigned Clark ("Clark") to Fire-Alarm on the B-Shift. Clark's responsibilities on Fire-Alarm included receiving emergency calls and dispatching ambulances. Sometime after Clark was assigned to dispatch duties, plaintiff alleges, Clark advised Chief Tyra that his hearing disability could compromise his ability to perform the critical task assigned him. Despite Clarks alleged warning, Tyra failed to relieve Clark of his duties as an emergency dispatcher.

At approximately 9:00 a.m. on May 19, 1999, Officer Troy Blando was shot while performing his duties as a police officer for the City of Houston. Shortly after the shooting, a 911 call was received by Captain Clark. Clark took down Blando's location and dispatched ambulance to the scene. However, the address taken down by Clark was inaccurate. As a result, the ambulances were delayed nearly 23 minutes until the mistake was discovered and corrected. An ambulance finally arrived on the scene at approximately 9:35 a.m. Upon arrival, paramedics found Blando to be alert and responsive. The paramedics rushed Blando to the hosptial. In route, however, Blando's heart stopped. Paramedics began C.P.R., which was continued upon arrival to the hospital. Unfortunately, the efforts to

resuscitate Blando were unsuccessful. Blando was declared dead at 10:23 a.m.

The representative of Blando's estate and relatives filed the present action against the City of Houston and Chief Tyra on May 18, 2001 asserting a cause of action under 42 U.S.C. § 1983. Presently before the Court is City of Houston's motion to dismiss for failure to state a claim upon which relief can be granted.

II. STANDARD OF REVIEW

In reviewing the sufficiency of a complaint in response to a motion to dismiss under rule 12(b)(6) before any evidence has been submitted the court's task is limited. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The issue is not whether plaintiffs will ultimately prevail, but whether the claimant is entitled to offer evidence to support its claims. *Id.* The court must consider all pleaded facts in the complaint. *Lawal v. British Airways, PLC*, 812 F. Supp. 713, 716 (S.D. Tex. 1992). Dismissal is not appropriate "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle him to relief. Conclusory allegations or legal conclusions masquerading as factual conclusions do not defeat a motion to dismiss. *Fernandez-Montes v. Allied Pilot Assoc.*, 987 F.2d 278, 284 (5th Cir. 1993).

III. DISCUSSION

42 U.S.C. § 1983 states that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Municipalities are not strictly liable under § 1983 on a respondeat superior theory for the acts of its employees or agents. See *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). Rather, "[i]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* Therefore, recovery against a municipality requires a three-part showing: (1) a policy maker; (2) an official policy; (3) which caused a violation of a constitutional right.

In the present case, Plaintiffs argue that a Chief Tyra, a city policy maker, made the decision to assign Captain Clark to duties as emergency dispatcher, a policy decision, despite his alleged knowledge of Clark's hearing disability. The City of Houston asserts that Tyra cannot be considered a policy maker and, even is he was, the decision to retain Clark as an emergency dispatcher was not an official policy.

However, assuming *arguendo* that Plaintiffs' assertions are true, Plaintiffs must also allege the violation of a constitutional right. Plaintiffs' first amended complaint states that "Chief Tyra's conduct deprived Officer Troy Blando of the following due process rights: a) the right to life; b) the right to liberty c) the right to bodily integrity; d) the right of association with his wife Judy Blando, his son Daniel Blando and his mother, Della Blando.

While the Court feels sympathy for the tremendous loss suffered by the Blando family, the facts alleged by Plaintiffs' fail to allege the violation of a constitutional right. In *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court held that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." 489 U.S. 189, 195. In other words, the Due Process Chuse is a limitation on government actions, not an affirmative duty to act. Accordingly, courts have uniformly held that, in general, a governmental entity does not have an affirmative duty to provide emergency medical care. See *Hill v. Shobe*, 93 F.3d 418, 422 (7th Cir. 1996) (holding that "The government, however, has no affirmative constitutional duty to provide emergency medical services to its citizens."); *Tucker v. Callahan*, 867 F.2d 909, 914 (6th Cir. 1989) (holding that a police officer did not have an affirmative duty to provide medical assistance if he did not cause the injury.).

Plaintiffs' failure to allege facts which, if true, would establish the violation of a constitutional right require that Plaintiffs' cause of action under 42 U.S.C. § 1983 be denied.

Accordingly, the Court

ORDERS that Defendant City of Houston's motion to dismiss is **GRANTED**.

SIGNED at Houston, Texas, this 14th day of March, 2002.

"s/ Melinda Harmon"

United States District Judge